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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent, **A122699**

v. **(Solano County Super. Ct. No. FCR223073)**

FRANK WILLIAM CUNLIFFE,

Defendant and Appellant.

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Appellant Frank William Cunliffe pled guilty to second degree murder (Pen. Code, § 187)[1] and a jury determined he was sane when he committed the crime. On appeal, appellant contends the court erred when it instructed the jury with CALCRIM No. 3450, the jury instruction pertaining to the determination of a defendant's insanity. We conclude any error in misinstructing the jury was harmless. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Incident

On March 29, 2005, Bonita French told the Fairfield Police her house had been burglarized. Fairfield Police Officer Brian Pereira went to French's house and noticed "the house had been completely ransacked. [It] [l]ooked like stuff had been tossed all over the place and completely damaged beyond repair." French told Pereira she had been

[1] All further statutory references are to the Penal Code.

in China for two weeks and her son, appellant, had been staying at her house. French also told Pereira she believed appellant had caused the damage; she asked Pereira for help "getting [appellant] removed from the residence."

A few days later, on April 2, 2005, Bonita French visited her friends and neighbors, Linda and Luis Mass. French told them that while she was on vacation in China, appellant "wrecked a brand new truck and . . . her house[.]" French told the couple she was afraid of appellant: she had woken up in the middle of the night to find appellant standing above her, staring at her. French said she wanted appellant "out of the house" because he was acting "weird." Linda and her husband discussed how French was going to ask appellant to leave the house and offered her a baseball bat for protection. French took the bat and returned to her house.

A short time later, Linda Mass (Mass) saw appellant come out of French's house. He threw something in the garage and went back inside the house. He was not wearing a shirt. Mass walked over to French's house and noticed the kitchen window was covered with a drape that looked like a sheet. Then Mass walked around the house and saw that all of the doors and windows were closed and that the sliding glass door at the back of the house was also covered. Mass thought this was unusual because French never had curtains on the windows.[2] After knocking on the door and receiving no answer, Mass called the police.

Fairfield police officers arrived at French's house and knocked on the door several times. They "[s]melled a strong odor of bleach coming from [the] inside of the garage." Using Mass's key, the officers announced themselves, opened the front door, and called French's name. At that point, appellant walked out of the master bedroom toward the front door. His face was "[v]ery pale" and he was "fumbling with a Band Aid on . . . his finger and . . . he had some bloodstains on his elbow and forearm area." Appellant asked the officers what they wanted. When the officers asked him whether his mother was

[2] Crime scene investigators observed that the kitchen window was covered by a bed sheet and held up with a knife driven into the wall.

home, he said, "'She's not here" and started to close the front door. Appellant also told the officers they needed a warrant to enter the house.

The officers pushed the door open, secured appellant, and searched the house. They noticed blood smears on the refrigerator door and master bedroom light switch. As one of the officers walked toward the garage, appellant said the officer could not go into the garage. The officer entered the garage over appellant's objection and noticed the washing machine was running and that it had "some blood smears and stains" on it. When the officer opened the washing machine, he smelled a strong odor of bleach and noticed "coagulated blood on the tray." The officer then found French's body in a storage bin covered with a tablecloth. French had suffered multiple stab wounds on her chin, face, abdomen, and hands. The officers arrested appellant. Shortly thereafter, when appellant's brother was cleaning the house, he discovered a large knife in the bathroom toilet tank. The knife had French's blood on it.

Appellant pleaded guilty to second degree murder (§ 187) and the court set a date for a jury trial on sanity.

Testimony Regarding Appellant's Sanity

At the trial on appellant's sanity, the parties presented the following evidence.

Defense Evidence

In 1999, appellant walked out of French's house with a butcher knife. He had a "starry gaze in his eyes" and said he was going to cut flowers for his girlfriend. When police officers approached him, he became argumentative and attacked them. When he was taken to the hospital, he yelled "'Slit my throat. Shoot me in the heart. B[low] my brains out.'" He was sent to state prison for battering a police officer.

Dr. Steven Terrini, a forensic psychologist, conducted a mentally disordered offender (MDO) evaluation on appellant in early 2004 pursuant to section 2962.[3] Dr.

[3] Pursuant to section 2962, a prisoner who meets specified criteria shall be required to be treated by the State Department of Mental Health as a condition of probation. The statute applies if the "prisoner has a severe mental disorder that is not in remission or cannot be kept in remission without treatment." (§ 2962, subd. (a).) The MDO criteria

Terrini reviewed appellant's medical records, which contained information that appellant had been diagnosed with a psychotic disorder in 1992 and had been admitted to Atascadero State Hospital as a MDO in 2001. Dr. Terreri concluded appellant had a psychotic disorder, exhibitionism, a significant drug problem, and features of antisocial personality disorder. He determined appellant qualified as a MDO in 2004.

Dr. Amy Phenix, a clinical psychologist, reviewed appellant's medical records in 2004 and also determined he met the criteria for a MDO. Dr. Phenix believed appellant suffered from antisocial personality disorder. She did not think appellant's issues were caused by long-term substance abuse. Neither Dr. Phenix nor Dr. Terreri opined on appellant's sanity in 2005, when he murdered French.

Dr. Albert Globus, a defense psychiatrist, evaluated appellant to determine whether he was sane when he murdered his mother. Dr. Globus interviewed appellant, reviewed his medical records, and determined appellant suffered from "chronic paranoia, schizophrenia" which began when he was seven or eight years old. Dr. Globus noted that appellant began using drugs when he was 13 and that using drugs can interfere with brain development and can make "schizophrenias worse." He opined, however, that appellant was mentally ill before he began using drugs.

According to Dr. Globus, appellant was psychotic and delusional on the day of the incident. Appellant was also "experiencing auditory hallucinations, which may or may not have been telling him what to do. . . ."[4] Dr. Globus based his opinion on several factors. First, appellant intentionally ruined a new truck French had given him. Second, he exhibited "strange behavior," which included staring at French while she was sleeping

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are: (1) the prisoner has a severe mental disorder; (2) he committed a qualifying offense; (3) his severe mental disorder was a cause or aggravating factor in his commission of that offense; (4) the disorder "is not in remission or cannot be kept in remission without treatment;" (5) he was treated for the disorder for at least 90 days in the year prior to parole; and (6) as a result of his disorder he represents a substantial danger of physical harm to others. (§ 2962, subd. (a)-(e).)

[4] Although appellant initially denied hearing voices on the day of the incident, he later told Dr. Globus that someone was "'jumping into him'" and encouraging him to kill his mother.

and damaging items in French's house while she was in China. Finally, appellant likely believed his mother was "under the guidance or influence of some evil force, perhaps an oriental security system" and that she was "trying to ruin his life."

Dr. Globus testified that appellant knew he killed his mother but that he was "unable to comprehend the nature and the quality of his act, due to mental illness[.]" Dr. Globus believed that appellant's actions after the incident, specifically his attempts to conceal the killing and avoid apprehension, were consistent with his "cognitive decline and bizarre irrational perception and understanding of the consequences of his behavior." Dr. Globus also characterized appellant's actions after the killing as "profoundly and moronically futile." According to Dr. Globus, appellant's attempt to cover the windows using bed sheets did not "seem like a very intelligent approach to avoiding detection." Similarly, Dr. Globus opined that appellant should have used hydrogen peroxide, not bleach, to clean up the blood stains. Dr. Globus conceded, however, that some of appellant's actions — such as washing his clothing, hiding French's body, and demanding the police obtain a warrant before entering the house — demonstrated some degree of rationality. Finally, Dr. Globus acknowledged that appellant's refusal to meet with two court-appointed experts "suggest[ed] the possibility of malingering."

Prosecution Evidence

In 2007, the trial court appointed Dr. Lois Armstrong, a psychologist for the Department of Corrections, to evaluate appellant's mental state at the time of the offense. Appellant initially refused to meet with Dr. Armstrong, but later agreed to speak to her through the food slot in his cell. During their conversation, appellant became "edgy and incensed[.]" He said his case concerned "identity theft" and that he was the "'true king of England.'" When Dr. Armstrong refused to answer appellant's personal questions, he became enraged and began screaming obscenities. A short time later, Dr. Armstrong ended the interview.

Dr. Armstrong reviewed appellant's medical records and the reports prepared by the defense experts. She opined appellant was sane when he killed his mother. Dr. Armstrong noted that appellant had suffered from "significant mental health issues" at

various times in his life, but that the "times . . . all pointed, however, to a kind of transient changing kinds of mental health symptoms. So at times he looked one way, and at times he looked very different, in another way." Dr. Armstrong also pointed out that appellant began abusing drugs and alcohol at age 12 and continued that "abuse and dependence" until his early 30's. According to Dr. Armstrong, appellant's "mental health issues really started after he started using drugs or alcohol." She noted that appellant most likely had a personality disorder exacerbated by the use of drugs and alcohol.

In explaining her conclusion that appellant was sane when he killed his mother, Dr. Armstrong testified appellant understood the nature and quality of his actions — i.e., he understood he was causing harm to his mother. She explained that appellant's "behavior after the offense indicate[d] . . . that he did know the differen[ce] between right and wrong." As an example, Dr. Armstrong pointed to an incident where appellant threatened to kill himself if he was "'not given a manslaughter deal'" and said that the only thing that would make him feel better was "'to escape or get laid[.]'" According to Dr. Armstrong, this behavior demonstrated appellant was "manipulative in nature and entitled" and "very familiar with the correctional system. [¶] He's been in and out [of the correctional system] most of his adult life, and he will demonstrate and say and do things that he believes will get him something that he wants."

Dr. Armstrong also noted that appellant's "goal-directed" behavior immediately after the killing demonstrated he understood the nature and quality of his actions and "was of rational mind" when he killed his mother. Dr. Armstrong explained that appellant closed the windows and blinds, locked the doors, did not answer the telephone or doorbell, used carpet cleaner and bleach on the bloodstains, moved furniture and rugs, washed blood-soaked laundry, moved his mother's body, and administered first aid to himself.

The trial court also appointed Dr. Edgar Catingub, a forensic psychiatrist, to evaluate appellant. After trying, unsuccessfully, to interview appellant, Dr. Catingub reviewed appellant's medical records and the police report and concluded appellant suffered from psychosis that was aggravated by his "chronic" use of methamphetamine,

alcohol, and hallucinogenic substances. Dr. Catingub determined, however, "with reasonable medical certainty, that [appellant] was sane at the time of the offense" and "had the capacity to . . . distinguish right from wrong, [and] knew the wrongfulness of his act." Dr. Catingub based his opinion on appellant's attempt to avoid detection after the crime, dispose of evidence, and avoid apprehension. Dr. Catingub noted that appellant: (1) did not answer the door when the police arrived at French's home; (2) covered the windows; (3) tried to dispose of evidence; (4) hid the murder weapon; and (5) lied to police. According to Dr. Catingub, appellant's actions "are consistent with someone that understood right from wrong, but also . . . understood the wrongfulness of the [ ] act."

Finally, Dr. Catingub explained that "[m]ental illness does not preclude sanity at the time of the act" and "the presence or absence of voices . . . wouldn't be the deciding factor on whether or not someone was capable of understanding the nature and quality of the act or right from wrong."

Jury Instructions

After the close of evidence, the court delivered jury instructions. The court delivered CALCRIM No. 3450 to the jury. The instruction provided in pertinent part:

"You must decide whether Mr. Cunliffe was legally insane when he committed the crime. [¶] The defendant must prove that it is more likely than not that he was legally insane when he committed the crime. [¶] The defendant was legally insane if: one, when committed the crime he had a mental disease or defect. [¶] And, two, because of that disease or defect, he did not know or understand the nature and quality of his act or did not know or understand that his act was morally or legally wrong. [¶] None of the following qualify as a mental disease or defect for the purposes of an insanity defense: Personality disorder, adjustment disorder, seizure disorders or an abnormality or personality or character made apparent only by a series of criminal or antisocial acts."

The court continued, "Special rules apply to an insanity defense involving drugs or alcohol." At that point, the prosecutor interrupted the court and the parties conducted a sidebar conference outside the hearing of the jury. The court then asked the jury to "[d]isregard that last half of that sentence" and resumed instructing the jury:

"If the Defendant suffered from a [settled] mental disease or defect caused by the long-term use of drugs or intoxicant, that settled mental disease or defect combined with another settled mental disease or defect may qualify as legal insanity. [¶] A settled mental disease or defect is one that remains after the effect of the drugs or intoxicants has worn off. [¶] You may consider any evidence that the defendant had a mental disease or defect before the commission of the crime. [¶] If you are satisfied that he had a mental defect or disease before he committed the crime, you may conclude that he suffered from the same condition when he committed the crime. . . . [¶] "If you conclude that the defendant was legally sane at the time he committed the crime, then it is no defense that he committed the crime as a result of an uncontrollable or irresistible impulse. [¶] If, after considering all the evidence, all twelve of you conclude that the defense has proven that it is more likely than not that he was legally insane when he committed the crime, you must return a verdict of not guilty by reason of insanity."

The written version of instruction provided by the trial court contained one additional paragraph:

"Special rules apply to an insanity defense involving drugs or alcohol. Addiction to or abuse of drugs or intoxicants, by itself, does not qualify as legal insanity. This is true even if the intoxicants cause organic brain damage or a settled mental disease or defect that lasts after the immediate effects of the intoxicants have worn off. Likewise, a temporary mental condition caused by the recent use of drugs or intoxicants is not legal insanity."

Closing Arguments and the Verdict

During closing argument, the prosecutor told the jury "it doesn't matter" whether appellant was "psychotic" or had an "antisocial personality" or whether he suffered from "polysubstance abuse or . . . schizophrenia" because appellant could not demonstrate he "didn't understand the nature of his act and didn't understand right and wrong" when he killed his mother. The jury determined appellant was legally sane when he murdered his mother and the court sentenced appellant to 30 years to life in state prison.

DISCUSSION

Appellant's sole contention on appeal is the court erred by instructing the jury with CALCRIM No. 3450.

CALCRIM No. 3450

"Insanity, under California law, means that at the time the offense was committed, the defendant was incapable of knowing or understanding the nature of his act or of distinguishing right from wrong." (*People v. Hernandez* (2000) 22 Cal.4th 512, 520.) The insanity defense "shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." (§ 25, subd. (b).) A defendant cannot be found not guilty by reason of insanity solely on the basis of personality disorder, adjustment disorder, seizure disorder, or an addition to or abuse of intoxicating substances. (§ 25.5.)

CALCRIM No. 3450 explains the requirements for finding a defendant insane. (3 Witkin, Cal. Criminal Law (3d ed. 2000 & Supp. 2010) Defenses § 7, pp. 338 & 331.) To prove he was legally insane when he committed the crime, the defendant must prove it is more likely than not: (1) he had a mental disease or defect when he committed the crime; and (2) because of that disease or defect, he did not know or understand the nature and quality of his act or did not know his act was morally or legally wrong. [5] (CALCRIM No. 3450 (Fall 2009 ed.) p. 917; see also *Hernandez, supra*, 22 Cal.4th at pp. 520-521.)

CALCRIM No. 3450 contains two alternative paragraphs that address how a jury should consider a defendant's use of drugs or alcohol when determining a defendant's

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[5] Section 25 is phrased in the conjunctive, requiring a finding that the defendant "did not know or understand the nature and quality of his act *and* did not know or understand that his act was morally or legally wrong." (§ 25, subd. (b), italics added.) The California Supreme Court, however, has interpreted the statute in the conjunctive, requiring a finding that the appellant "was incapable of knowing or understanding the nature of his act *or* distinguishing right from wrong." (*Hernandez, supra*, 22 Cal.4th at p.520, italics added.)

insanity. The first paragraph is given when the sole basis of the defendant's alleged insanity is the defendant's use of intoxicants. (CALCRIM No. 3450, Bench Notes, pp. 918-919.) That paragraph provides: "Special rules apply to an insanity defense involving drugs or alcohol. Addiction to or abuse of drugs or intoxicants, by itself, does not qualify as legal insanity. This is true even if the intoxicants cause organic brain damage or a settled mental disease or defect that lasts after the immediate effects of the intoxicants have worn off. Likewise, a temporary mental condition caused by the recent use of drugs or intoxicants is not legal insanity."

The second alternative paragraph is given when the defendant's use of intoxicants is "not the sole basis or causative factor of insanity, but rather one factor among others[.]" (CALCRIM No. 3450, Bench Notes, pp. 918-919.) That paragraph provides: "If the defendant suffered from a settled mental disease or defect caused by the long-term use of drugs or intoxicants, that settled mental disease or defect combined with another mental disease or defect may qualify as legal insanity. [¶] A settled mental disease or defect is one that remains after the effect of the drugs or intoxicants has worn off. [¶] You may consider any evidence that the defendant had a mental disease or defect before the commission of the crime[s]. [¶] If you are satisfied that he had a mental disease or defect before he committed the crime[s], you may conclude that he suffered from that same condition when he committed the crime[s].

Any Error in Misinstructing the Jury Was Harmless

Here, the judge read only the second of the two alternative paragraphs to the jury. The written version of CALCRIM No. 3450 provided to the jury, however, contained both optional paragraphs. "To the extent a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control." (*People v. Wilson* (2008) 44 Cal.4th 758, 803.)

According to appellant, the first paragraph — beginning with "Special rules apply to an insanity defense" — "did not apply to the evidence" and therefore undermined his

ability to present a defense.[6] "When an appellate court addresses a claim of jury misinstruction, it must assess the instructions as a whole, viewing the challenged instruction in context with other instructions, in order to determine if there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner." (*Wilson, supra*, 44 Cal.4th at p. 803; see also *People v. Thomas* (2007) 156 Cal.App.4th 304, 310.)

As an initial matter, we note that minor discrepancies between written and oral versions of instructions do not necessarily constitute reversible error. (*People v. Crittenden* (1994) 9 Cal.4th 83, 137-138; *People v. Garceau* (1993) 6 Cal.4th 140, 189-190, overruled on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118; *Wilson, supra*, 44 Cal.4th at p. 804 [technical error in written instructions was harmless error].)

Even if we assume the written instruction was erroneous, we conclude the error was harmless because there is not a reasonable probability that, absent the error, the jury would have returned a verdict more favorable to appellant. (*People v. Robinson* (1999) 72 Cal.App.4th 421, 429; *People v. Flood* (1998) 18 Cal.4th 470, 490 [instructional error subject to harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818, 836]; *People v. Riggs* (2008) 44 Cal.4th 248, 311, criticized on another ground in *People v. McCall* (2004) 32 Cal.4th 175, 187, fn. 14.) We reach this conclusion for several reasons. First, the court "orally instructed the jury with the correct instruction." (*Wilson, supra*, 44 Cal.4th at p. 804.) Although appellate courts give "priority to the written version of an instruction when a conflict exists between the written and oral versions, the jury is not informed of this rule. It is thus possible the jury followed the oral instruction. Second, there is no indication the jury was aware of the slight difference between the

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[6] Appellant claims "[t]he trial court read" the two alternative paragraphs to the jury. He is mistaken. The court began reading the first sentence of the first alternative paragraph to the jury when the prosecutor interrupted. After a sidebar conference, the court asked the jury to disregard that sentence. Then the court read the second alternative paragraph. We therefore assume appellant takes issue with the *written* version of the jury instructions which contained both alternative paragraphs.

written and oral versions of the instructions, as it asked no questions about this point." (*Ibid.*)

Third, appellant did not present any evidence that his insanity was caused solely by his long-term substance abuse. As a result, "a reasonable jury would simply have dismissed" that portion of the written instruction "as inapplicable." (*Robinson, supra,* 72 Cal.App.4th at p. 429, fn. omitted.) Fourth, the two optional paragraphs of CALCRIM No. 3450 relate to the cause of the defendant's mental illness, not to whether that illness prevented him or her from knowing or understanding the nature and quality of the act and from knowing whether the act was morally or legally wrong. The issue at trial was not whether defendant suffered from a mental defect or disease, but whether that defect or disease prevented him from knowing or understanding the nature and quality of his actions or from knowing his actions were morally and legally wrong.

Finally, the evidence of appellant's alleged insanity was "weak." (*Robinson, supra,* 72 Cal.App.4th at p. 429.) Both court-appointed experts testified that appellant was sane at the time of the killing. They explained that appellant understood the nature and quality of his actions; knew right from wrong; and had a "rational mind," when he killed his mother. Both Dr. Armstrong and Dr. Catingub based their opinion on appellant's numerous attempts to avoid apprehension and dispose of evidence after the crime. In contrast, neither Dr. Terrini nor Dr. Phenix opined on appellant's sanity when he killed his mother. Although Dr. Globus, a defense expert, testified appellant's schizophrenia prevented him from understanding the nature and quality of his actions, he admitted that appellant's behavior after the killing "demonstrated some degree of rationality." And he conceded appellant's refusal to meet with two court-appointed experts "suggest[ed] the possibility of malingering."

Appellant's reliance on *Robinson, supra,* 72 Cal.App.4th at page 427, is misplaced. There, the appellate court concluded the trial court should not have given a special instruction based on section 25.5 because the defendant "did not rely on his long-term substance abuse and possible resulting mental damage or disorder as the sole cause of his insanity." (*Robinson, supra,* 72 Cal.App.4th at pp. 423, 428.) The court also

concluded, however, that any error in giving the instruction was harmless because there was not a reasonable probability that, absent the error, the jury would have returned a verdict more favorable to appellant. (*Id.* at p. 429.) The *Robinson* court also noted that the evidence of the defendant's alleged insanity was "weak" and that the jury likely "dismissed the special instruction as inapplicable." (*Ibid.*, fn. omitted.) The same is true here and, as a result, *Robinson* does not assist appellant.

Appellant claims the inclusion of both optional paragraphs was "hopelessly confusing" to the jury. We disagree. There is no indication the jury was confused. The jury deliberated for fewer than two and a half hours before reaching a verdict and asked no questions about the jury instructions. For the reasons discussed above, error in the written instruction was not prejudicial. (Cal. Const., art. VI, § 13; *Crittenden, supra*, 9 Cal.4th at p. 139.)

Having reached this result, we need not address appellant's claim that his counsel's failure to object to the jury instruction constituted ineffective assistance of counsel.

DISPOSITION

The judgment is affirmed.

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Jones, P.J.

We concur:

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Simons, J.

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Bruiniers, J.